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 1                 IN THE UNITED STATES DISTRICT COURT

 2                FOR THE EASTERN DISTRICT OF TEXAS

 3                        MARSHALL DIVISION

 4   HUAWEI TECHNOLOGIES CO. LTD )(

 5                               )(  CIVIL DOCKET NO.

 6                               )(  2:16-CV-00052-JRG-RSP

 7   vs.                         )(  MARSHALL, TEXAS

 8                               )(

 9   T-MOBILE US, INC.,  ET AL   )(  MARCH 2, 2017

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13                        MARKMAN HEARING

14              BEFORE THE HONORABLE ROY S. PAYNE

15              UNITED STATES MAGISTRATE JUDGE

16

17   APPEARANCES:

18
     FOR THE PLAINTIFF:  (See sign-in sheets docketed in
19                         minutes of this hearing.)

20

21   FOR THE DEFENDANT:  (See sign-in sheets docketed in
                           minutes of this hearing.)
22

23   COURT REPORTER:  Ms. Tammy L. Goolsby, CSR

24   Proceedings taken by Machine Stenotype; transcript was produced
     by a Computer
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 3    Date:  March 2, 2016

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 1                    P R O C E E D I N G S

 2           COURT SECURITY OFFICER:  All rise.

 3           THE COURT:  Good afternoon.  Please be seated.

 4           For the record, we're here for the Claim Construction

 5   Hearing in Huawei versus T-Mobile, et al, which is Case

 6   No. 2:16-52 on our docket.

 7           Would counsel state their appearances for the record?

 8           MR. THOMPSON:  Good afternoon, Your Honor.  Blake

 9   Thompson, Ruffin Cordell, Richard Sterba, and David Barkan for

10   Huawei.  We're also joined by some Huawei representatives David

11   Roe, Alex, Linmei, Ben, and Wade, and we're ready to proceed,

12   Your Honor.

13           THE COURT:  All right.  Thank you, Mr. Thompson.

14           MR. JONES:  Your Honor, for T-Mobile Mike Jones

15   together with Ms. Cynthia Vreeland, Ms. Kathryn Zalewski,

16   Mr. Mark Selwyn, and Mr. Joe Mueller.  Thank you.

17           THE COURT:  All right.  Thank you, Mr. Jones.

18           MR. NEWTON:  Your Honor, Michael Newton for Nokia

19   Solution and Networks, and with me is Nokia representative

20   Ms. Elaine Drager.

21           THE COURT:  All right.  Thank you, Mr. Newton.

22           MR. PHILBIN:  Good afternoon, Your Honor.  Phillip

23   Philbin of Haynes & Boone on behalf of the Ericsson entities,

24   and with me this afternoon is Mr. Jamie McDole.

25           THE COURT:  Thank you, Mr. Philbin.
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 1   MR. PHILBIN: Thank you.

 2   THE COURT: I will also note for the record that a

 3   little while ago we provided to counsel for all parties a set

 4   of preliminary constructions.

 5   The intent of providing those preliminary

 6   constructions is not to dissuade any party from taking whatever

 7   position they feel is appropriate on these disputed terms, but,

 8   rather, to let the parties know where the Court is after the

 9   initial review of the briefs and the record and to allow you to

10   focus your arguments and your attention where you think the

11   Court may have most gone astray.

12   I do reserve the right to and not uncommonly do alter

13   these constructions based on the arguments received at the

14   hearing, so I hope that you'll take them in that spirit.

15   I would like to have the arguments presented on a

16   term-by-term basis, but I'm happy to group the terms or order

17   the terms in any way that counsel feel is most efficient.

18   So with that, I will turn it over first to counsel

19   for Plaintiff.

20   MR. BARKAN: Good afternoon, Your Honor.

21   THE COURT: Good afternoon, Mr. Barkan.

22   MR. BARKAN: I'll be brief on these terms. With

23   respect to both the '365 and also the '617 patent, we agree

24   with the Court's tentative.

25   We had originally proposed identical construction for

1 | both patents, but we are now of the view that the Court's

2 | tentative correctly differentiates between the two patents and

3 | that the construction in '365 is correct and that ordinary

4 | meaning is correct for the '617, so I'll just make some brief

5 | remarks for the '615 patent.

6 | THE COURT: All right.

7 | MR. BARKAN: With respect to the '365 patent, as

8 | reflected in the Court's tentative, we think the claims here

9 | are specific. There is language in each of the claims that

10 | necessary data is data which is required. That word required

11 | appears in the claims every time necessary data is used and

12 | gives flavor and meaning to the use of necessary data.

13 | The specific information identified in the Court's

14 | tentative, the CIP URL of the P-CSCF and the contact address of

15 | the user device, those are the only embodiment that is

16 | described in the patent.

17 | There are various different flavors of how the

18 | messages are passed that contain that information, but there is

19 | no embodiment of any other data that is sent back and forth

20 | that would be necessary data.

21 | In that vein, for the Court's benefit I did want to

22 | direct the Court to a case from the federal circuit from last

23 | year, which is think is significant here. It's Trustees of

24 | Columbia University 811 F3rd 1359.

25 | And the significance of this case is that we

1   sometimes see cases that quote the dicta from the Thorner case

2   where the Federal Circuit appeared to have set a rule that

3   terms are given a specific meaning only if there's a clear

4   definition or an expressed disavow, and sometimes the Thorner

5   case is read to be very rigid.

6   And in the Columbia University case last year, the

7   Federal Circuit made clear that that is too narrow a notion and

8   that the case law doesn't require explicit re-definition or

9   disavow, and so there is a very helpful discussion at 1363 to

10   1364 in which the Court collects cases showing that Thorner

11   should not be read as narrowly as requiring those two options

12   for any kind of specific definition of a term.

13   And with that, I will conclude my remarks unless the

14   Court has any questions for Plaintiff.

15   THE COURT: Not at this point, Mr. Barkan. Thank

16   you.

17   MR. BARKAN: Thank you, Your Honor.

18   MS. VREELAND: Your Honor, the Defendants and

19   Intervenors agree with the Court's constructions for the '617

20   patent.

21   We would like to briefly address the Court's

22   construction for '365 patent, and all three terms incorporate

23   this concept of necessary data, and so I'd like to briefly

24   address them together.

25   And just by way of background, as Your Honor knows

1   from having read the briefs, the '365 and '617 patents share a

2   specification that focuses on recovering after the failure of a

3   component in an IMS system.

4   And the core components discussed in the patent are

5   what we in shorthand refers to as the P, the I, and the S, the

6   proxy, the interrogating, and the serving call session control

7   function, and the core component providing most of the

8   functionality here is the S.

9   And the claims of both patents focus on methods to

10   enable recovery if one of these S fails, and reflected in the

11   claim is the straightforward idea that when a user registers --

12   when the phone registers for one of these IMS systems, the S

13   that is assigned to that user will save what the patent calls

14   necessary data or backup data in the home subscriber service.

15   And then if that S subsequently fails and the system

16   assigns a new S to a particular user, that new S can then

17   retrieve this backup data and use it to restore service.

18   And the terms of both patents, the necessary data

19   terms in the '365 patent and the restoration data terms in the

20   '617 patent all focus on this backup data.

21   And in the '365 claim, the patent that we'd like to

22   focus on in our argument, the claims use the word necessary

23   data to refer to this backup data, and you can see in the claim

24   essentially the same idea that we saw in those pictures.

25   In the first element, the initial S assigned to a

1   user backs up that necessary data. In the second limitation,

2   the I component assigns a new S after that first S fails, and

3   then in the last -- in the last element we have the newly

4   assigned S going and getting that necessary data to restore

5   service.

6   And I think a critical starting point here, an

7   important starting point, and I think it reflects one of our --

8   the biggest issues we wanted to raise with Your Honor is the

9   term in the '365 patent is called necessary data. The term in

10 the '617 patent is called restoration data.

11   And an important starting point is whether these are

12 referring to the same things or different things, and I -- and

13 Your Honor, of course, gave them different constructions. I

14 would like to as a starting point -- and it's not in my slides,

15 Your Honor, but I can hand up Huawei's brief, and I wanted to

16 point Your Honor in particular to page 14 of their opening

17 brief, if I may.

18   THE COURT: I have the brief, so it's --

19   MS. VREELAND: It's page 14 of Huawei's opening

20 brief, the first full paragraph.

21   THE COURT: All right.

22   MS. VREELAND: So in their brief, Huawei first

23 addresses the '365 patent necessary data. They then address

24 the '617 patent restoration data, and they acknowledge that

25 during briefing both parties believed that both terms should be

 1 construed the same.

 2   Specifically they say that the '617 patent is a

 3 continuation of the '365 patent. It's directed to the same

 4 inventive concept. The claims of the '617 patent, however, do

 5 not refer to the user data necessary for restorations as

 6 necessary data. Instead the claims use the terms restoration

 7 data or restoring data.

 8   The parties appear to agree that these restoration

 9 data terms refer to the same concept claimed in the '365 patent

10 as necessary data, and they, therefore, should have the same

11 constructions. Indeed Defendants have also proposed the same

12 construction for the '617 and '365.

13   And, Your Honor, from the Defendant's perspective, we

14 continue to believe, as both parties represented during

15 briefing, that the necessary data terms and the restoration

16 data terms in the '617 should have the same construction, and

17 we would urge Your Honor to apply the same construction in the

18 '365 patent that Your Honor did in the '617 patent.

19   THE COURT: If the parties agreed on a construction,

20 I very likely would, but you agree on a framework perhaps, but

21 you disagree on what the construction should be, and so that

22 doesn't do me a lot of good.

23   But I understand your point that the parties had the

24 beginning of an agreement, but I'm back in the absence of an

25 agreement I have to try and figure out what the best

1   Construction of the terms is.

2   And I do understand that they share the same

3   specification, but it's different claim language, and I think

4   the circuit pretty clearly directs me through Phillips to start

5   with the claim language.

6   MS. VREELAND: And I'd like to, in just a few more

7   minutes, persuade you that the '617 construction should also be

8   applied to the '365 patent, Your Honor.

9   And just as a practical matter, I think a real world

10 fact perhaps explains why the words are a little bit different,

11 and that is that between the '365 patent and the filing of the

12 '617 patent, the standards started talking about using the word

13 restoration data, and I think that perhaps might be one reason

14 why the terminology changed.

15   But I think a critical fact here is that although one

16 patent uses the term necessary data and the other restoration

17 data, we're talking about the very same embodiments. You know,

18 there's not -- you know, there's not any difference in the

19 patent between the relevant backup data.

20   THE COURT: I mean, one thing that I'm dealing with

21 in looking at these is that restoration data appears to be a

22 broader term. The fact that a dependent claim was added looks

23 to be a further attempt to broaden that term, and so I am

24 dealing with those factors as well.

25   MS. VREELAND: Your Honor, the -- you know, the

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 1  first -- I guess I had set up the issue, and I wanted to turn

 2  to Your Honor's question about the plain meaning of the word

 3  because I do think that that's an important starting point,

 4  and, of course, the issue here is should the specific

 5  embodiments be read in.

 6         We would urge -- and Huawei had proposed that the

 7  embodiments be read in for both patents.  We had urged a plain

 8  meaning construction for both patents, and I do think an

 9  important point for '365 patent is the plain meaning of the

10  term.

11         You know, we believe that necessary data has as broad

12  a plain meaning as the -- as the restoration data in the '617

13  patent, and there's certainly nothing in the word necessary

14  data that would imply a CIP URL of the P or the other very --

15  the contact address that Huawei -- Huawei is attempting to read

16  into the '365 claims.

17         We think necessary data has -- you know, is as

18  capable of being understood by a jury as restoration data and

19  that there's no basis for departing from that plain meaning.

20         THE COURT:  Of course, the term that we're construing

21  is not just necessary data.

22         MS. VREELAND:  Yes, Your Honor.  You're right.  It's

23  necessary data which is required when a user service processing

24  is restored.  Yeah, that's correct.  The phrase is a larger

25  one.
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1   THE COURT: And required I think has to be taken into

2   account also.

3   MS. VREELAND: Certainly, Your Honor, and I think

4   what the -- you know, the -- for sure for the '365 patent, if

5   the -- if the inventors thought that their invention was

6   specific to the CIP URL of the P and the contact user

7   information that they're asking to be read into both claims, I

8   mean, if they thought that was their invention in the '365

9   patent, then they could have specified that in the claims as

10   they did in the '617 dependent claims, but they didn't. They

11   chose a broader term. They chose the term necessary data, and

12   they did that, so, you know, they intentionally did not limit

13   these claims to the embodiments.

14   And I think an important point here, too, Your Honor,

15   is not only necessary data which is required when a user

16   service processing is restored, I mean, that's a pretty simple

17   idea. You -- the data is the data that's necessary to restore

18   service. It's a -- it's a -- even at longer term is easily

19   understood.

20   So there's no basis for reading in the embodiments

21   and, in fact, Your Honor, the embodiments that they are trying

22   to read in are only some of the embodiments.

23   I mean, I would start with the point that the

24   specification does broadly refer to necessary data, you know,

25   whatever you need to restore service. That is what is referred

 1 to when the core concept of the invention is described. It's

 2 what's referred to in the summary of the invention.

 3   There's no reference to a CIP URL of a P or a contact

 4 address in the summary of the invention, and to the extent that

 5 the specific -- the specific CIP URL of a P and a contact

 6 address are referred to at all, they're referred to only in

 7 some of the embodiments.

 8   It's referred to in figure five, and it's referred to

 9 in figure seven. There's no reference to that in figure six,

10 so there are embodiments in this patent where the necessary

11 data would not include the CIP URL of the P or the contact

12 address of the user.

13   And if I can just briefly explain the significance of

14 these different embodiments?

15   THE COURT: All right.

16   MS. VREELAND: There's some examples in the patent,

17 you know, there will be a called party and a calling party, and

18 each of those parties will have assigned to them their own S,

19 and when the S of the called party fails, the calling party,

20 you know, necessary data -- and this is the situation in figure

21 seven.

22   When the -- when the S of the -- of the called party

23 fails, well, then among the things that in the examples are

24 used to restore service is this CIP URL of the P and the

25 contract address of the user. But in the opposite situation

1   when the calling party has an S that fails, that same

2   information isn't required because the calling parties' I is

3   going to know those things.

4   So I know that's a lot of complicated technology

5   and -- and the P's and the I's and the S's are a lot of -- a

6   lot of technical terms, but suffice it to say that there are

7   some embodiments in the claim that's like five and seven that

8   specifically refer to the things that -- that Huawei is asking

9   Your Honor to read into the claims.

10   There are other embodiments and examples like six

11 that don't refer at all to the P of the CIP URL or the contact

12 address of the user device because in these examples -- in the

13 calling party example you wouldn't -- that information wouldn't

14 be necessary.

15   So they're asking you to read in a few -- read in

16 some necessary data for some of the examples that wouldn't be

17 necessary for others of the examples, so for that reason we

18 believe it makes more sense.

19   THE COURT: Are those the examples that are claimed

20 in claim one?

21   MS. VREELAND: The claim, Your Honor, is general.

22 The claim would cover either situation.

23   THE COURT: And do those other embodiments that

24 you've referred to say that these elements are not present or

25 are you just saying they're not described, they're not called

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 1   out in that embodiment?

 2           MS. VREELAND:  They're not called out in the

 3   embodiment.  The -- the figure six embodiment refers to

 4   acquiring the restoring data, and it doesn't -- you know, it --

 5   which, you know, frankly is similar to the language in the

 6   '617, and there's no reference to the P or the -- the P CIP URL

 7   or the contract address of the user device.

 8           And as a matter of -- you know, I'm certainly not an

 9   expert in the field, but I understand from folks that

10   understand this technology better than me that in this

11   situation when the mobile device is the calling party, the

12   figure six example you -- the -- it wouldn't be necessary to

13   have the -- the CIP URL of the P or the contact address of the

14   user device in order to restore service.

15           THE COURT:  You know, the -- other than the fact that

16   there is a reference to embodiment in this part of the detailed

17   description that you put the first part of up on the screen,

18   the core concept of the present invention, it's fairly

19   definitional language.

20           MS. VREELAND:  Well, I think what they are describing

21   is for these examples -- for the examples -- for the example in

22   figure seven, for example, what you would need if the -- if the

23   called parties S fails, you would need -- if you were going to

24   set things up like the examples in the patent, you know, in the

25   examples in the patent, the -- the -- P CIP URL and the contact
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 1 address would be what you would need to reserve service in

 2 those examples.

 3   But the key thing here is, Your Honor, the -- the

 4 applicants didn't limit their claims to the examples in the

 5 patent, so, you know, the fact that in the examples in the

 6 patent that there might be what you need in the figure seven

 7 situation to restore service doesn't mean that the claim --

 8 that that particular aspect of a particular embodiment should

 9 be read into the claim.

10   THE COURT: I mean, that's really what we're talking

11 about, though, isn't it, whether or not that is what they were

12 claiming, whether or not that's what necessary data means.

13   MS. VREELAND: Right. And I would point Your Honor

14 to the '617 patent. I mean, if they -- you know, in the '617

15 patent they have the broad claim to restoration data and they

16 have a dependent claim to the CIP URL of the P and the contact

17 address of the user device.

18   I mean, they knew how to claim that when they met.

19 They didn't claim it with the claims that refer to restoration

20 data, and they didn't claim it with the claims that refer to

21 necessary data.

22   THE COURT: Well, necessary data is the term that is

23 used in the specification where this definitional language

24 appears. Restoration data is not.

25   MS. VREELAND: Well, that would be true for the

1   figure seven example. I mean, if you have the failure of a

2   called parties' S, the thing -- what would be necessary to

3   restore data might be the CIP URL of the P and the contact

4   address.

5   But in other examples of the patent, figure six, you

6   wouldn't need that to restore -- to restore service, and it's

7   not even mentioned in connection with figure six.

8   THE COURT: All right.

9   MS. VREELAND: And I would also -- Your Honor,

10 Huawei, they -- the primary reason that they asked the Court to

11 read in the embodiment is they say that the patent would be

12 invalid otherwise, that not reading in the embodiment would

13 negate the inventive contribution.

14   But that's not a reason, Your Honor, to read in the

15 embodiment. They chose broad claim language, and there is no

16 disclaimer either in the specification or the file history

17 where prior art was distinguished based on whether or not they

18 stored the CIP URL of the P or the contact address of the user

19 device.

20   And for that reason, we think that the case that they

21 cited to Your Honor Parallel Networks is easily

22 distinguishable. That was a case where the Court read in --

23 read in disclaimer language. There was a prosecution history

24 disclaimer there.

25   There's no prosecution history disclaimer here, and

 1 we would say the much more relevant authority would be the

 2 Hill-Rom case where the Federal Circuit confirmed that if the

 3 claim language is clear that the Court should not rewrite it to

 4 preserve validity.

 5   THE COURT: Okay.

 6   MS. VREELAND: And, you know, we do not -- we do not

 7 contest the Court's construction in the '617 claim. We believe

 8 that the Court's construction of restoration data should be

 9 applied to both patents.

10   And I would point out that the -- Your Honor had

11 rightly focused on for the '365 patent about the longer claim

12 term that talked about necessary data required when processing

13 is restored, and there's that same notion here.

14   The restoration data is used for restoring the

15 service that failed, so in both patents there's this notion of

16 going and getting the data that you need to restore service,

17 and, again, in some examples, like example seven, that might

18 include the CIP URL of the P and the contact user address. But

19 in other examples, like example six, it would not.

20   THE COURT: All right.

21   MS. VREELAND: So for that reason we would ask that

22 the Court apply the construction for -- that the Court has

23 issued for restoration data to both patents consistent with the

24 parties' positions at least in briefing that the restoration

25 data in the '617 patent had the claim meaning as the necessary

1   data in the '365 patent.

2   THE COURT: All right. Thank you, Ms. Vreeland.

3   MR. BARKAN: May I respond briefly, Your Honor?

4   THE COURT: Yes.

5   MR. BARKAN: As the Court has noted, there is a

6   difference between the '617 use of restoration, a term that

7   does not appear in the specification, from the necessary data

8   language of '365, which does.

9   In with respect to the '365, I want to comment on the

10   figure six example that counsel raised. In the figure six

11   example, there are numerous references to backup data, and when

12   we look at the primary definitional statement, which appears at

13   column seven, starting at approximately line 28, that's the

14   section that defines specifically the CIP URL and the contact

15   address.

16   And it says that this is an extended definition

17   that's added to the SAR message that is AVP user backup data,

18   and so the reference to figure six, the backup data is to this

19   AVP user backup data, and we can see that in the narrative part

20   of the specification at column 11 in the paragraph that begins

21   at line 36 where it talks about certain registration flow and

22   it refers to AVP user backup data.

23   And so when we match those up, we see that when the

24   figures use the phrase backup data, that's a shorthand for the

25   AVP user backup data, which is expressly defined in the

1   specification as the CIP URL of the P-CSCF and the contact

2   address of the user device.

3   And so we think that these examples simply further

4   confirm that in the '365 necessary data has been explicitly

5   defined to include those two items as in the Court's tentative.

6   I have no further comments if the Court has no other

7   questions.

8   THE COURT: All right. Thank you.

9   MS. VREELAND: And I can respond if Your Honor would

10 like or I can sit down and let the next term be.

11   THE COURT: I am happy to have your response. I know

12 this term is important.

13   MS. VREELAND: And I think the response, Your Honor,

14 would just be to direct you to the -- to figure six, which I

15 don't think I have on a slide, but in figure six you can see

16 that the failure occurs when the I assigns a new S.

17   There's a box sort of in the middle of the figure,

18 and that I, as the text explains in explaining figure six, and

19 we talk about the contact address of the UE and the CIP URL,

20 which is essentially the address of the P, we're talking about

21 things that that I will have at the time that this S fails.

22   So if -- if -- so the -- there's no need -- if you're

23 going to restore in this figure six situation, there's no need

24 for -- and this is again the -- the situation where the calling

25 party's S fails, that I doesn't need that information because

 1   it already has that information, so we disagree with Huawei's

 2   position on figure six. Thank you.

 3   THE COURT: All right. Thank you, Ms. Vreeland.

 4   All right. We're ready for the next term.

 5   MR. STERBA: May it please the Court, Your Honor,

 6   Richard Sterba for Huawei.

 7   We're going to turn now to the '339 patent, having

 8   addressed all of the terms at issue for the '365 and '617

 9   patents. The bottom line, Your Honor, is Huawei agrees with

10   the Court's tentative or preliminary claim constructions.

11   We think you've in some instances gone with our

12   proposed constructions and some instances you have not

13   precisely gone with our proposed constructions, but the Court's

14   proposed constructions have captured what we believe was the

15   distinction that we were trying to make between our proposed

16   construction and the Defendant's and Intervenors' proposed

17   constructions.

18   So with that, Your Honor, unless the Court has any

19   questions, I would yield the podium.

20   THE COURT: All right. Thank you, Mr. Sterba.

21   MR. NEWTON: Your Honor, Michael Newton for the

22   Defendants and Intervenors, and we actually do have some

23   PowerPoint slides to hand out.

24   THE COURT: All right.

25   MR. NEWTON: May I approach, Your Honor?

 1   THE COURT: Yes, sir.

 2   MR. NEWTON: So, Your Honor, with regard to the '339

 3 patent, with regard to the notification terms, we're in

 4 agreement that your construction is correct, and so apparently

 5 we had a disagreement that was fake and you came up with a

 6 better -- a better word than we came up with, either notifying

 7 or instruct or request we think is the right way to go.

 8   So with that, I'd like to focus on the term is error;

 9 and if you'll follow me to slide 36 in our presentation. So on

10 slide 36, Your Honor, I put up claim 11 where the phrase is

11 error is included. And as you can see, we think the phrase to

12 focus on is this phrase if a user plane using a One Tunnel

13 technology is error.

14   And Defendants and Intervenors claim that this term

15 is indefinite, and it's because there's plainly an error in the

16 phrase, and the question that the Court has to consider is

17 there reasonable debate as to what the proper construction or

18 correction should be.

19   And Huawei proposed a construction that says this

20 should just mean if a user plane using a One Tunnel technology

21 is invalid rather than is error. We believe there's at least

22 two reasonable constructions, and I want to present those, if I

23 may.

24   THE COURT: All right.

25   MR. NEWTON: So turning to slide 17, the debate at

1   issue is, is the correction subject to a reasonable debate, and

2   if you go to slide 38, we note that Huawei had an opportunity

3   to make this straightforward correction if, indeed, it was

4   straightforward when they filed a certificate of correction

5   just a year before they filed suit.

6   And they did correct straightforward things like they

7   turned the letter B into the word by, so they filed a

8   correction not long before they filed suit, but they didn't try

9   to correct this is error phrase to just is invalid when they

10   had the opportunity there.

11   So turning then to slide 39, if we look in the

12   specification and try to understand what's going on here and

13   what the other possible reasonable interpretation is, it's

14   important to understand the context of the way these claims

15   work.

16   So what happens is the -- the access network device

17   realizes there's a problems, and it sends an error indication

18   to the anchor device, the gateway, and when it receives that

19   error indication, it doesn't know or it has to make a

20   determination is that error indication for a tunnel that's

21   using One Tunnel technology or Two Tunnel technology.

22   If it's not using One Tunnel technology, it doesn't

23   want to send a message to the control plane, and the control

24   plane, you don't want it to configure to receive a message in

25   that context.

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 1          So it's very important that not only do you determine

 2   that there is an error, but you look at this error indication

 3   and say, are we using a One Tunnel technology.  Only in that

 4   case do you send a control message or a message that's then

 5   received by the control plane, and then the control plane will

 6   fix the tunnel.

 7          So when you see this phrase if a user plane using a

 8   One Tunnel technology is error, it's important to understand

 9   what's going on in that type of language.

10          And, again, if you'll look just at the spec that

11   we've cited there in the abstract and then figure two, they

12   describe this determination of when you look at the error

13   indication, you have to ask the question is the user plane for

14   that error indication using One Tunnel technology or not.

15          So, Your Honor, if you'll proceed with me to the next

16   slide then, focusing on the claims, all the other independent

17   claims, one, three, nine and 14, use a similar phrase.  They

18   use this phrase if a user plane corresponding to the error

19   indication uses a One Tunnel technology.

20          So, again, it's recognizing that I look at the error

21   and I decide if the user plane corresponding to that error is

22   One Tunnel technology or not, and so that was in every other

23   independent claim.

24          And so we would say if you look and now ask what was

25   the proper correction for the claim that has the error in it,
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1   we would say another reasonable interpretation is to rewrite

2   claim 11 so that it looks like the other claims.

3   And, in fact, instead of saying if a user plane using

4   a One Tunnel technology is invalid, instead replace that with

5   if a user plane corresponding to an error indication uses a One

6   Tunnel technology. Then you may ask is there a difference

7   between those interpretations? I think their arguably could

8   be.

9   So you're not asking whether the tunnel's invalid.

10 You're asking whether the error indication corresponds to One

11 Tunnel technology or not. And, again, if it doesn't, there's

12 no reason to send a message to the control plane and there's no

13 reason to configure a control plane to receive a message unless

14 the error indication corresponds to One Tunnel technology.

15   So we would say there's an alternative proposal here

16 that's reasonable as well. It's -- and in view of that we

17 would say that you have two possible reasonable constructions,

18 so the Court shouldn't make this correction. Only the patent

19 office should if they decide that this isn't subject to

20 reasonable debate.

21   THE COURT: The claim 11 language that you're drawing

22 on.

23   MR. NEWTON: Uh-huh.

24   THE COURT: Claim 11 is drafted from the perspective

25 of the core network control plane, the SGSN, isn't it?

1   MR. NEWTON: Yes, it is.

2   THE COURT: And isn't claim nine -- I'm sorry. No.

3   Claim nine is the one that had the -- the error indication

4   language that you're drawing from?

5   MR. NEWTON: Well, claim one, three, 14 and nine,

6   they all have that.

7   THE COURT: And are any of them from that same

8   perspective of the SGSN as opposed to the GGSN?

9   MR. NEWTON: They're not solely from one device or

10   the other. Some of them mix different things, so none of the

11   other independent claims are solely the control plane or SGSN.

12   THE COURT: So in the ones that are from the

13   perspective of the GGSN, the error indication, if we were going

14   to construe it that way, would be being sent from the device to

15   the same device?

16   MR. NEWTON: No. So what you have is you have --

17   just looking at the figure, you have your access network device

18   or RNC in the 3G network.

19   THE COURT: Uh-huh.

20   MR. NEWTON: It sends an error indication to the GGSN

21   or the gateway, the anchor. The anchor then makes the

22   determination I was talking about, does that error indication

23   correspond to One Tunnel technology or not.

24   If it does, then I'm going to send a message to the

25   control plane and say, hey, you need to fix things because

1 we're in a One Tunnel situation. This isn't going to get

2 corrected quickly if I don't let you know. But if the error

3 indication corresponded to Two Tunnel, there's no reason to

4 send it.

5   And I think what you're getting at, Your Honor, is,

6 okay, this claim 11 is focused on the control plane, but that

7 if language is I'm going to configure this thing to receive a

8 notification if certain things happen. That certain thing

9 happening relates to what's happening at other devices.

10   I only want to be configured to receive this

11 notification if the GGSN or the anchor said I'm in a One Tunnel

12 technology context. If I'm not in One Tunnel technology, I

13 don't want to configure it to receive an error message.

14   THE COURT: That was the weakness that I saw in your

15 analogy with the claim 11 -- the claim nine term is that when I

16 mapped it out, it did not make sense to apply that in the claim

17 11 context.

18   MR. NEWTON: And what I say to this, Your Honor,

19 that -- that if phrase is saying I'm only -- I'm going to

20 configure my system to receive this notification only if

21 certain things happen some place else, and the question is what

22 is that something else that's happening? Is it simply that

23 I've got an invalid tunnel or is it that I've looked at an

24 error indication and determined that I have -- I'm using One

25 Tunnel technology?

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 1              THE COURT:  All right.  Well, I understand the issue

 2   is your proposal, your second construction a plausible reading

 3   of the claim, and that's -- I understand that's what I've got

 4   to examine, and if it is, then I understand your issue.

 5              MR. NEWTON:  Understood.  Thank you, Your Honor.

 6              THE COURT:  Thank you.

 7              MR. NEWTON:  So I guess the next set of terms are the

 8   unit terms.  Should I go ahead?  I don't want to --

 9              THE COURT:  I would like to hear the Plaintiff's

10   response on that.

11              MR. STERBA:  If I could just briefly respond, Your

12   Honor.

13              Your Honor correctly draws the distinction between

14   the various independent claims in Huawei's '339 patent; and,

15   yes, the issue is that the Defendants and the Intervenors are

16   seeking to put forward this second plausible construction, as

17   they put it, by importing a limitation into the claims.

18              And it's I think with reference just to the

19   Defendant's own slide 41, we can see that their proposed

20   reasonable correction is to import this error indication

21   language into this claim 11.

22              But claim 11 is referring to the state of the -- of

23   the user plane or the down -- what is the downlink data path as

24   being invalid, and the simple correction of the word error to

25   the word invalid really captures what the gist of the -- of the
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 1   invention is and preserves the meaning of the claim correcting

 2   this facial error.

 3            THE COURT:  Why wouldn't this have been corrected

 4   earlier by the patentee?

 5            MR. STERBA:  So that's -- that's certainly a fair

 6   question, Your Honor.

 7            The construction -- the certificate of correction

 8   that the patentee filed about a year before, less than a year

 9   before filing the complaint, caught two errors and corrected

10   those two errors.  One was a missing letter.  The other was a

11   missing word, so these are errors of a typographical nature.

12            And this error is an error of a grammatical nature,

13   one that was, quite frankly, not as readily apparent despite

14   the fact it is a clear error on the face of the patent we see

15   now.  It was not the typographical error corrected by the

16   certificate of correction.

17            THE COURT:  Walk me through your rebuttal to the

18   Defendant's argument that the reference could be to the error

19   indication.

20            MR. STERBA:  The claim -- so the -- if I could, Your

21   Honor, the claim itself is directed to -- or I should say the

22   invention itself is directed to a situation of an invalid

23   downlink data tunnel.

24            THE COURT:  Uh-huh.

25            MR. STERBA:  And the invention is focused on -- or
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1   the gist of the invention is focused on how to recover this

2   downlink data tunnel once it's determined to be invalid.

3   The invention is not focused on merely detecting that

4   the data tunnel, the downlink data tunnel is invalid. It

5   really is focused on the recovery process.

6   So what this claim is focused on is the error state

7   of this -- you know, of this element. The error indication is

8   not -- you know, is not included in this aspect of the claim.

9   THE COURT: All right. Thank you, Mr. Sterba.

10   MR. STERBA: Thank you.

11   THE COURT: Let's see. Mr. Newton, you can proceed

12 to the next claim -- next term.

13   MR. NEWTON: May I respond just briefly to what was

14 just said? So I would think if we're talking about scope of

15 the claim, one is a broader scope and another one is more

16 narrow. I think both of them can be reasonable. Just because

17 mine may arguably be more narrow, that doesn't make it

18 unreasonable.

19   THE COURT: You would agree that interpreting error

20 as referring to invalid is a reasonable construction?

21   MR. NEWTON: Yes, Your Honor, I would.

22   THE COURT: Okay. Go ahead.

23   MR. NEWTON: So, Your Honor, moving to the so-called

24 unit terms -- and I feel a little bit like you allowed us to

25 amend to add these, and I get this feeling having seen your

1   tentative that the Judge giveth and then the Judge taketh away,

2   but let me see what I can do to bring things back and at least

3   present our perspective on this.

4   So I'm on slide 46 in our presentation, and we

5   obviously read regularly your decisions on Docket Navigator and

6   where else, so we're well aware that --

7   THE COURT: I feel sorry for you.

8   MR. NEWTON: Well, and we understand that you have a

9   certain view of unit terms and -- and what the jurisprudence

10   should be, but I think this is an interesting situation for the

11   following reason, and it's something that we never had a chance

12   to write about in our briefs because of the way the briefs were

13   done.

14   So we did the first expert declaration in our

15   responsive claim construction brief, and we did not see

16   Huawei's expert declaration until their reply, so the Court

17   doesn't have before it kind of our response, so I'd like to, if

18   you would indulge me for a minute while I talk a little bit

19   about why even under your tentative construction, which is that

20   the terms are not 112(6), that we still think the claims are

21   indefinite.

22   And I'm going to go a little bit into a history

23   lesson here, and the history lesson begins in 1946 with the

24   Halliburton versus Walker, U.S. Supreme Court case, and this is

25   Before the 1952 Act was introduced.

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 1            So in 1946, the Court said we're going to deem a

 2   claim invalid if it has a limitation which basically claims by

 3   what something does rather than what it is, so at a high level

 4   said functional claiming is not appropriate.

 5            And so in 1952, Judge Markey and the U.S. Congress

 6   went about the business of fixing what happened in Halliburton,

 7   and when you read Halliburton a little more closely, you

 8   realize why did they end up at that kind of a reasoning?  Why

 9   is it that functional claiming is not good?

10            Well, one of the reasons for having a patent system

11   is to encourage innovation, and if you allow someone to patent

12   something and claim functionally what they do and get every

13   structure that possibly implements that functionality, then you

14   basically obstruct innovation because there's no way to design

15   around or to do something that gets that same function, but in

16   a different way that's not covered by the claim.

17            So in 1952, we get this carve out, this safe harbor

18   of 112(6), and it says we're going to allow you to claim

19   functionally because there may be some things that no one has

20   ever described before.  Now, the quid pro quo, the exchange for

21   that safe harbor, is you have to tell me what the structure is.

22            So if I design something that's removing barnacles

23   from the bottom of a boat and I give you a scraper mechanism,

24   I'm going to allow you to claim, you know, a mechanism for

25   removing barnacles from the bottom of a boat, but if you're --
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1 show me a scraper, don't come in and then say you want a paint

2 brush with a chemical on it. You don't get all of that.

3   So the safe harbor here is limited to the structures

4 you put in the patent and structural equivalence. And so here

5 at least under your tentative, Huawei has not taken advantage

6 of this safe harbor.

7   So another follow-on case once the 112(6) law was

8 enacted and the Federal Circuit started to look at it more

9 closely, they said it's not good enough to say a person skilled

10 in the art would know of a structure. You don't get every

11 structure in that mechanism, and it's not good enough to simply

12 refer to structures that perform the recited function that are

13 known to a person skilled in the art. You have to actually

14 disclose a specific structure.

15   So in the reply, as I pointed out, we received a

16 declaration of Dr. Nettleton, and Dr. Nettleton told us what

17 the structures were in the patent that implemented the

18 receiving, the sending, and the storage unit, and he said a

19 POSITA, so a person of ordinary skill in the art, would know

20 that these things could be implemented basically as hardware,

21 software, basically anything.

22   So he, in essence, is trying to cover every structure

23 that performs the function. And interesting what he didn't do

24 is say, oh, a person skilled in the art knows of a definite

25 structure that implements that.

1   So we would claim if they don't want to take

2   advantage of the safe harbor of 112(6), then the claims are

3   still indefinite because they use terms where they're trying to

4   claim every receiving, sending, and storage unit mechanism that

5   does the functionality recited in claims nine, 11 and 12.

6   So I don't know if you have any questions on that,

7   Your Honor. I was going to go back now and focus a little bit

8   on the analysis of the 112(6) analysis looking at what they've

9   said in their reply.

10   THE COURT: You know, I think the first question

11   under 112(6) is whether or not the claim term implies

12   structure; right?

13   MR. NEWTON: A sufficiently definite structure,

14   correct.

15   THE COURT: Uh-huh. And so that's a decision that's

16   made in the context of the specification.

17   MR. NEWTON: That's correct.

18   THE COURT: And --

19   MR. NEWTON: Well, that -- no, I think the first step

20   is what a person knows, so let's say I say receiver, and I'm

21   talking about a cell phone. I say receiver and a transmitter.

22   I think a lot of experts would say, oh, yeah, I know

23   what the receiver is. It takes whatever modulation you're --

24   you know, you're using. You demodulate, and I gave you a data

25   stream.

1   So in that context, I think the question is when I

2   say receiving unit or sending unit, do I know of a definite

3   structure that implements that in step one of the means plus

4   function analysis.

5   THE COURT: I think it's is it a structural term or

6   is it a functional term, and if it's a term that implies

7   structure within that -- the context of that specification,

8   then you don't get into 112(6). It's not functional claiming.

9   MR. NEWTON: But I have to know that it is a

10   structure; correct? I mean, that's what I say.

11   THE COURT: Right.

12   MR. NEWTON: So I think what you've done here --

13   THE COURT: You don't have to know what structure it

14   is, but you have to know it's a structure.

15   MR. NEWTON: But it's an existing structure. Are we

16   in agreement on that? I mean, my view is that it's got to be a

17   definite structure. It's got to be one that people know of,

18   that I could go and say, oh, I know what the structure is for

19   that.

20   THE COURT: Well, either one people know of or one

21   that's described in the specification. I don't think there's

22   anything that would prevent it from being a novel structure.

23   MR. NEWTON: I agree if they teach you how to do it.

24   I mean, if you're -- so if I say receiver -- well, I'm

25   thinking -- think about amplifier. When amplifiers first came

1 around, no one knew what that was, and pretty soon you saw what

2 an amplifier was and it started to take on a life of its own.

3   I'm trying to think of other terms that are like

4 that, when they were first introduced, you didn't know what it

5 was, and little by little people start to understand what it

6 is.

7   I think here when you say receiving unit, does that

8 strike up a particular structure in somebody's mind? I think

9 that is the first question on the means plus function analysis.

10   THE COURT: And obviously it's not just receiving

11 unit. It's receiving unit as used within the context of that

12 claim and the way that claim is amplified by what's set out in

13 the specification.

14   And, I mean, there's a presumption that it's not

15 112(6). You have to overcome that, and I have -- you know, the

16 approach I've taken here is to provide a construction of it

17 that I think is supported by the specification and that shows

18 that it is a structural and not a functional claim.

19   MR. NEWTON: And people skilled in the art know what

20 that structure is, a particular structure? I guess I'm trying

21 to understand Your Honor.

22   Maybe I can move it along this way. If you look with

23 me with slide 53, so in the patent, they say that these

24 receiving, sending, and storage units exist within a GGSN, and

25 I guess the question we're struggling with is within a GGSN,

1   what comprises the receiving unit? Is that, in fact, the

2   structure or are you just saying it's the thing that does the

3   function that's described there?

4   Same with sending unit. Is sending unit simply the

5   thing that does those functions or do people know what the

6   sending unit is within the GGSN? The same with the storage

7   unit. And if you look back at some of the declarations, we at

8   one point asked is the storage unit just a memory, and the

9   other side said, no, it's not.

10   And I think when you look at these devices, you know,

11   your first gut might be in a context of a after server like

12   this. You say receiving unit, oh, that must be the network

13   access card that receives the packets, strips off all the

14   headers. And the same for the sending unit, the network access

15   card that does that on the other end.

16   And I think what they would say is, oh, no, this

17   could be anywhere. It could be in the processing unit within

18   the CPU, so where we're struggling is the receiving unit

19   software on the processor, is it hardware in a network access

20   card, is it software in a network access card? Where does this

21   reside within that -- within the GGSN?

22   THE COURT: All right. I understand your issue.

23   MR. NEWTON: And we would just say one other thing,

24   Your Honor.

25   When you look at what Dr. Nettleton said and you look

1   at what the expert said in the Williamson case, we think these

2   declarations are very similar, and in essence what they try to

3   say, it's any structure, software, hardware, a mix of the two,

4   that implements the functionality with no recitation of a

5   definite structure that performs that functionality, so we do

6   believe it's in the realm of functional claim.

7   THE COURT: All right. Thank you, Mr. Newton.

8   MR. CORDELL: May it please the Court, Your Honor,

9   Ruffin Cordell. May I be heard on the unit terms?

10   THE COURT: Yes, sir.

11   MR. CORDELL: Okay. So, first of all, we agree a

12   hundred percent with the Court in both your preliminarily

13   construction and in the analysis the Court just discussed with

14   Mr. Newton.

15   We begin with the proposition that these are not

16   means for or step for claims, so the presumption lies against

17   construction in 112(6) terms. That's absolutely undisputed.

18   What we have here is a couple of advantages that --

19   Mr. Newton took us through a number of cases. The one that we

20   believe is perhaps the most apt is this Court's decision from a

21   couple of years ago in the E2E Processing, the Cabela's case.

22   And if I could have slide 35 from our set, we

23   actually have a couple of excerpts from that case, and they

24   are -- the Court will recall that the term that was being

25   construed was component. And like in this case, it was coupled

1   with several prefixes, selectro component, adapto component,

2   and integration component.

3   But in the E2E case, Your Honor found that that

4   prefix lent structural significance to each of those terms and

5   then went on to the specification to find how those -- each of

6   those terms interacted with each other and with the remaining

7   structures of the patent to construe them as, in fact, being

8   structural and not means plus function.

9   Here we have the added advantage that the

10 interactions between the sending and receiving and storage

11 units are right in the claims. They're in claims nine and 11,

12 so we don't even have to go to the specification, so this is --

13 this is actually a case that is further from means plus

14 function treatment than was the E2E case.

15   Mr. Newton addressed Dr. Nettleton's declaration, but

16 focused only on the beginning paragraphs, the introductory

17 paragraphs, and didn't focus on what I believe is the meat of

18 his declaration.

19   If I could have slide 35, here we see where

20 Dr. Nettleton actually goes into these claim terms and says

21 point blank a POSITA would need to know only the inputs and

22 outfits of the various units, along with their corresponding

23 functions to implement the units because they are readily

24 understood components of well-known elements within a packet

25 core network performing well under known functions.

1   He says that a sending unit and a receiving unit and

2   a storage unit are, in fact, well-known structures within a

3   packet network. That -- that evidence is essentially

4   undisputed. We have -- we had a declaration from Mr. Lanning,

5   the Defendant's expert, who said, you know, I can't really tell

6   and I don't really know, and, yet, Mr. Lanning himself was able

7   to immediately map claim nine to a GGSN and claim 11 to an

8   SGSN. He was able to immediately know exactly where in the

9   network these elements lie.

10   But there's also an abstraction issue here, so what

11   we're talking about here is not a patent on a receiving unit.

12   This isn't something that is talking about taking data off of a

13   high speed line and sampling it and putting it in the buffer

14   and then sending it on.

15   Those details are not the invention that we're

16   talking about here, and so it's not surprising that the patent

17   talks about them in network terms. This is a network patent,

18   and so it treats them in network terms.

19   And if I can have slide 36, we see that Dr.

20   Nettleton, in fact, himself recognizes this and says that these

21   are -- these are -- first of all, he says these are

22   indispensable to the function of these entities, so everybody

23   uses them.

24   But it made explicitly showing them in figures three

25   through five unnecessary. Indeed, they are not typically shown

 1 | in a call flow diagram in any 3GPP standard, and he says I'm

 2 | unaware of any POSITA under my supervision or tutelage being

 3 | confused by their absence.

 4 | So we talk a lot about these standards in these

 5 | cases, and the 3GPP standard is sort of the one we all point

 6 | to, and what Dr. Nettleton is telling us here is that this is

 7 | the -- this is the level of abstraction that people use for

 8 | these kinds of ideas for these kinds of systems.

 9 | So we believe that the Court's construction is

10 | exactly correct. We think the interaction between these units

11 | to the extent that they're not structural on their face proves,

12 | in fact, that they are structural and that no 112(6) treatment

13 | is appropriate here.

14 | THE COURT: All right. Thank you.

15 | MR. NEWTON: Your Honor, just briefly, if I may, if

16 | we can go back to our slide presentation. So on slide 55, we

17 | were quoting from a paragraph later than what was put up

18 | earlier. We're in paragraph 37 where the expert is saying that

19 | the structures that can implement this functionality are -- you

20 | know, could be software, could be hardware, and he gives a

21 | bunch of alternatives of things that could be used.

22 | Now, when we moved to amend in this case, we started

23 | having a discussion, and when we moved to amend the infringing

24 | contentions -- or the invalidity contentions and our claim

25 | construction contentions, it was clear that we were starting to

 1 | have a claim construction dispute.

 2 | And the dispute is probably is: If you ask us to

 3 | name the receiving unit and we're going to say it's a network

 4 | access card and we say the sending unit is a network access

 5 | card on the other side and it turns out that the functionality

 6 | here is in a central processing unit, we're going to have a

 7 | dispute.

 8 | And what they're trying to do is they're trying to

 9 | say if it's in the network access card, that counts. If it's

10 | software in the processing unit, that counts as well. If it's

11 | hardware somewhere between the two, that counts as well. That

12 | is not good enough, and that's why it's different than E2E and

13 | different than your PanOptis decision and different than

14 | Chrimar and all the other decisions that deal with these unit

15 | issues.

16 | They're trying to take too much. They want to say

17 | it's every structure known to somebody skilled in the art that

18 | can implement this functionality, and there's not a specific

19 | receiving unit that they've been able to identify that does it.

20 | They want it whether it's in the network access card,

21 | whether it's in the CPU, or whether it's specifically designed

22 | hardware to accelerate this kind of processing, and in that

23 | sense, we think they've gone too far.

24 | So if they don't take 112(6), they don't get into

25 | that safe harbor, they haven't described any specific

1   structure. They're trying to claim every structure that does

2   the functions for those units.

3   THE COURT: You know, I -- I think that there is a

4   lot to the argument that Mr. Cordell has made about the level

5   of abstraction because where these terms become most

6   problematic is when they are not such ordinary things as

7   receiving, sending, and storing, and where they are part of the

8   inventive concept of the patent that's claimed, and I don't see

9   these claims as involving that.

10   MR. NEWTON: Well, if I may, Your Honor, I have a

11   slide on that. I do believe that these terms do involve the

12   inventive aspect.

13   So if you look, for example, in claim nine, which

14   I've put up on slide 54, I think it is, you can see the

15   communication device there only comprises the receiving unit,

16   the sending unit, and the storage unit and the functions they

17   perform.

18   So this isn't a scenario where I've described a cell

19   phone and I say, hey, it's got a receiver, it's got a

20   transmitter, and the magic is in the middle. The magic here

21   has to be within one of those three units or a combination of

22   the three and so the functions they perform, their new

23   functions.

24   And so you're doing something different. You haven't

25   taken the old GGSN and say just use those structures to do

1   these functions. You've added something new, and the question

2   is where did you add the something new and how did you do it.

3   THE COURT: It's the manner in which they're

4   configured, is it not?

5   MR. NEWTON: I think it's the functions they do.

6   Because if it's just the way they're configured, the GGSN, I

7   think they would say it had a receiving unit, it had a sending

8   unit, it had a storage unit.

9   For sure it had the ability to store data. It had

10 the ability to receive information, and it had the ability to

11 send information, so it's these functions that are being done,

12 and you're asking, well, how are they done and where are they

13 done.

14   Is it in software that's in the CPU? Is it software

15 that's in the network access card? Is it new hardware you've

16 added somewhere else? Is it, you know, different hardware than

17 what was already in the GGSN?

18   THE COURT: But how is the receiving, sending, and

19 storing function the inventive aspect that's being claimed

20 here?

21   MR. NEWTON: Because they have configured those units

22 in a new way supposedly, whichever one of those things is new,

23 to receive an error indication and do a particular thing, to

24 instruct a core network control plane to do a particular thing.

25   So you've re-configured these devices in some way to

1   do this, but the question would be what exactly is it that you

2   reconfigured? And to my point, is it the microprocessor, the

3   CPU? Are you going to waste processing time to do it there?

4   Are you going to do it in the front end in these network access

5   cards that are designed in a lot of senses? And you're going

6   to have a case on this in a couple of months.

7   You know, are you writing directly from the network

8   access card to memory and never bothering the CPU and then

9   reading out of that memory and going through the card or are

10 you doing something in the processor, new software, or are you

11 just adding all new hardware?

12   So I would say this, Your Honor, and if you look at

13 the claims, it looks to me like they took their method claim

14 and said I need to create an apparatus claim. Hey, let's just

15 take the receiving function and call that a receiving unit.

16 Let's take the sending function and call that a sending unit,

17 and let's take the storage function of storing a new PDP

18 context and call that a storage unit.

19   So I think this case is a bit different than a lot of

20 the other unit cases that you have. These really aren't new

21 elements. I mean, they're not old elements. They're made up

22 elements, if you will, to functionally claim.

23   THE COURT: All right.

24   MR. CORDELL: Brief response, Your Honor?

25   THE COURT: All right. That's fine, Mr. Cordell.

1 Thank you, Mr. Newton.

2   MR. CORDELL: In fact, this is a combination claim,

3 and each of these elements are configured in a particular way,

4 and that's part of what we'll have to prove to prove

5 infringement, and we have to find all of them.

6   Mr. Newton's fundamental complaint is not about claim

7 construction. It's that he thinks the claim is broad, and the

8 answer to that is they need to come forward with prior art if

9 they believe that the claim is, in fact, broad.

10   We've heard several times that, wait, there are a lot

11 of different ways that you could implement, you know, this

12 technology; but, you know, there's no dispute, at least today,

13 that the term receiver is well-known, but there are millions of

14 different ways to configure a receiver.

15   There are digital receivers. There are analog

16 receivers. There are some that are made with tubes. There are

17 some that are made with chips. There are some that are done in

18 software. There's some that are done in hardware.

19   That's not the issue. The issue is whether one of

20 ordinary skill would understand these to be structural

21 components, and the record is that, in fact, they would, and so

22 with that, I think it confirms that the Court's analysis is

23 correct. Thank you.

24   THE COURT: All right.

25   MR. NEWTON: Briefly, Your Honor. This will be the

 1 | last time.

 2 | THE COURT: I'll give you the last word, Mr. Newton.

 3 | MR. NEWTON: Mr. Cordell said receiving unit

 4 | well-known, sending unit well-known. I sense what they're

 5 | going to end up doing is saying, oh, all this is really in a

 6 | processing unit. That's not even discussed in this claim.

 7 | So they're going to say, oh, those functions, they're

 8 | are done in the processing unit, not in the receiving unit, not

 9 | in the sending unit, or the storage unit. It's going to be

10 | done in a processing unit.

11 | And that's what we're trying to avoid. You can't

12 | just draw these lines willie-nillie however you want. If

13 | you're doing that, you're trying to get every possible way to

14 | do this, and in that sense, these structures aren't known.

15 | They're not like a receiver in a phone. They're not like a

16 | transmitter in a phone.

17 | THE COURT: I mean, there's nothing that would

18 | prevent this claim from reading on a device that had multiple

19 | receivers, multiple transmitters, multiple storage units,

20 | memories, as long as there were such components that were

21 | configured in this matter; right?

22 | MR. NEWTON: If I knew what those were.

23 | THE COURT: I mean, you're complaining to me that

24 | they may be able to point to different components that perform

25 | that function.

1   MR. NEWTON: What I'm complaining about is they are

2   trying to claim every possible way to do it by putting

3   functional limitations in, you know, configure to do and saying

4   that it receives and then tell me how they're configured and

5   then trying to claim every possible way to do it.

6   So whether you did that in software, new hardware,

7   whether you ran the software in a microprocessor or on a

8   network access card, you don't know exactly where the lines are

9   drawn, and they're trying to get every possible way, and I

10   think that's functional claiming rather than structural

11   claiming.

12   THE COURT: All right. I understand the argument.

13   Thank you.

14   MR. NEWTON: Thank you.

15   THE COURT: Are there any other arguments that the

16   parties have to present at this time?

17   MR. CORDELL: I think that's it, Your Honor. Thank

18   you.

19   THE COURT: All right. Ms. Vreeland?

20   MS. VREELAND: No others. Thank you, Your Honor.

21   THE COURT: All right. Thank you for the arguments.

22   They have been helpful, and I will endeavor to get a ruling out

23   as soon as possible, so thank you and we're recessed.

24   COURT SECURITY OFFICER: All rise.

25

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 1    (Hearing concluded.)

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1   CERTIFICATION

2   I HEREBY CERTIFY that the foregoing is a true and

3   correct transcript from the stenographic notes of the

4   proceedings in the above-entitled matter to the best of my

5   ability.

6

7   _____   Date: 3/6/17
     Tammy L. Goolsby, CSR
8   Deputy Official Court Reporter
     State of Texas No.: 3101
9   Expiration Date: 12/31/18

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